No. 11629.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELY A. TODOROW and LEONARD A. POTOLSKI,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

MORRIS LAVINE,
620 Bartlett Building, Los Angeles 14
Attorney for Defendants and Appellants.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TABLE OF AUTHORITIES CITED

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To the Honorable Court of Appeals for the Ninth Circuit:

Since our opening brief this Court has decided *Samuel, et al. v. United States of America,* No. 11,402 (August 24, 1948). We believe this case is decisive of several of the issues which we have presented herein.

In their brief the Government points out various War Assets Administration Regulations which they claim place the matter within the jurisdiction of the War Assets Administration. They quote the Surplus Property Act of 1944 and War Assets Administration Regulation No. 2 and various other sections, which they claim give jurisdiction to the War Assets Administration of the matters therein comprehended.

The difficulty, however, is that the jury was at no time given such information, either by way of evidentiary matters by the regulations being placed in evidence, or even by instructions to the jury.

Thus, what this Court said in *Samuel, et al. v. U. S.* as to the duty of the Court to instruct the jury on all essential questions of law involved, whether or not it is requested to do so, is peculiarly applicable here.

> **"In a criminal case the court must instruct on all essential questions of law involved, whether or not it is requested to do so.** Kreiner v. United States, Cir. 2, 11 Fed. 2d 722; Kinard v. United States, C. A. D. C., 96 Fed. 2d 522; Morris v. United States, Cir. 9, 156 Fed. 2d 525; United States v. Levy, Cir. 3, 153 Fed. 2d 995; Corson v. United States, Cir. 9, 147 Fed. 2d 437; Miller v. United States, Cir. 10, 120 Fed. 2d 968; Screws v. United States, 325 U. S. 91, 107; United States v. Noble, 3 Cir., 155 Fed. 2d 315; United States v. Pincourt, Cir. 3, 159 Fed. 2d 917; see 169 A. L. R. 305-355 on the subject generally. We think giving the wrong law in this case was certainly not less prejudicial than omission to give the law at all.
>
> "The applicable O. P. A. law is set out in the margin, and it shows that the formula for ascertaining the maximum wholesale whiskey price as given by the court had no relation to it." (*Samuel, et al. v. United States, supra.*)

In the present case the Court at no time gave the jury an instruction as to the applicable statutes or regulations

covering the War Assets Administration. The Court gave this charge to the jury:

> "Statements and representations as to intended use of surplus property by an applicant, which may be contained in 'Veterans' Applications for Surplus Property' and 'Purchase-Requisition Forms,' are 'statements and representations' within the meaning of the statute which the defendants are charged with violating.
>
> "You are further instructed as a matter of law that the War Assets Administration is an 'agency of the United States,' and that statements and representations in 'Veterans' Applications for Surplus Property' and 'Purchase-Requisition Forms' are matters within the jurisdiction of an agency of the United States, within the meaning of that statute."

This was objected to as invading the province of the jury, but at no place did the Court give the jury an instruction as to the applicable statutes or regulations involved. This was the duty of the Court to do. (*Samuel, et al. v. United States, supra.*)

The Court in this case not only did not give the law or the regulations, but what it did give was erroneous. This, therefore, is reversible error. (*Samuel, et al. v. United States, supra.*)

In our specification of errors in the opening brief we did not separately list under a heading the point that:

The Court failed to instruct the jury on the application laws and regulations of the War Assets Administration.

We argued it, however, under Point A, page 6, and on page 11 of our opening brief, and we request that it be designated as a separate specification, the authorities being above cited.

The regulation certainly did not apply on July 11, 1946, when veterans' preferences ceased, and it was simply the desire of the Government to sell its surplus property without regard to any preferences.

The second point that is decisive of this case has also been decided in *Samuel, et al. v. United States of America,* and that is that where the verdict is a general one, as in this case, and three or more alleged false statements are made and the jury instructed that their verdict might be given of guilty with respect to any one of the statements, it is impossible to say upon which, if any, of the statements the jurors agreed and it may be that one juror agreed on one and another juror on another and the third on another matter. Under the instructions given by the Court, which counsel objected to very strenuously, such an incorrect result necessarily followed.

In the case of *Samuel, et al. v. United States of America,* page 16 of the Court's opinion, this Court said:

> "The case of Stromberg v. California, 283 U. S. 359, raises much the same point on principle that we have under consideration, and therein at p. 367, the court said: 'The verdict against the appellant

was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury were instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. It may be added that this is far from being a merely academic proposition, as it appears, upon an examination of the original record filed with this Court, that the State's attorney upon the trial emphatically urged upon the jury that they could convict the appellant under the first clause alone, without regard to the other clauses. (In our case the emphasis upon the same idea was a mandatory instruction to the jury by the judge presiding.) It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.' The case of Williams v. North Carolina, 317 U. S. 287, presents a situation close on principle to our case. At pp. 291-292, the court says: '* * * the verdict against petitioners was a general one. Hence, even though the doctrine of Bell v. Bell * * * (181 U. S. 175), were to be deemed applicable here, we cannot determine on this record that petitioners were not convicted on the other theory on which the case was tried and submitted, viz., the invalidity of the Nevada decrees because of Nevada's lack of jurisdiction over the de-

fendants in the divorce suits. That is to say, the verdict of the jury for all we know may have been rendered on that ground alone, since it did not specify the basis on which it rested. It therefore follows that here as in Stromberg v. California, 283 U. S. 359, 368, that if one of the grounds for conviction is invalid under the Federal Constitution, the judgment cannot be sustained. (Invalidity for any other reason would be as effective.) No reason has been suggested why the rule of the Stromberg case is inapplicable here. Nor has any reason been advanced why the rule of the Stromberg case is not both appropriate and necessary for the protection of rights of the accused. To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights.' The Supreme Court said by way of note to Haupt v. United States, 330 U. S. 631, at p. 641: 'When speaking of a general verdict of guilty in Cramer v. United States, 325 U. S. 1, 36 n. 45, we said "Since it is not possible to identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted was insufficient," of course we did not hold that one overt act properly proved and submitted would not sustain a conviction if the proof of the other overt act was insufficient. One such act may prove treason, and on review the conviction would be sustained, provided the record makes clear that the jury convicted on that overt act. *But where several acts are pleaded in a single count and submitted to the jury, under instructions which allow a verdict of guilty on any one or more of such acts, a reviewing court has no way of knowing that any*

wrongly submitted act was not the one convicted upon. If acts were pleaded in separate counts, or a special verdict were required as to each overt act of a single count, the conviction would be sustained on a single well-proved act. As the acts were here pleaded in a single count, and the jury were instructed that they could convict on any one, we would have to reverse if any act were insufficent or insufficiently proved. *Cf.* Stromberg v. California, 283 U. S. 359, 368; Williams v. North Carolina, 317 U. S. 287, 292, and Cramer v. United States, *supra.*' (Emphasis added.)

"Summarizing our conclusion is: The judgment must be and is reversed because it rests upon a general verdict which may have been found upon the jury's conclusion that a conspiracy existed to violate any one, any two, or all of three United States laws, set up in one count, one of which was erorneously defined to the jury, and such erroneously defined law was so closely connected with both of the other laws in the alleged conspiracy as to affect the decision upon them to the reversible prejudice of all defendant-appellants."

Several other points are discussed in the Government's Brief but none of them sufficiently answer our opening brief to require further discussion here or else they miss the points presented by us.

Respectfully submitted,

Morris Lavine,
Attorney for Defendants and Appellants.